BRIEF FOR THE INDUSTRIAL BOARD OF THE STATE OF NEW YORK IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI.

This is an application by the Industrial Board of the State of New York to review by writ of certiorari a decision of the Court of Appeals of the State of New York in the above entitled proceeding, which affirmed an order of the Appellate Division of the Supreme Court, Third Judicial Department, reversing an award for compensation under the Workmen's Compensation Law of the State of New York and dismissing the claim.

The dismissal of the claim by the Appellate Division of the Supreme Court was on the ground that the claimant was included within the scope of the Federal Employers' Liability Act, as amended on August 11, 1939, by virtue of which amendment the State Industrial Board had no jurisdiction of the claim.

Opinions Below.

The decision and majority and minority opinions of the Supreme Court, Appellate Division, Third Judicial Department (R. 81-93) are reported in Vol. 263 App. Div. at page 461.

The Court of Appeals rendered no opinion but the memorandum decision of that Court is recorded in Vol. 288 N. Y. Reports 243 (Mem.). The decision of the Court of Appeals was rendered on June 18, 1942. The record was remitted to the Supreme Court, Appellate Division, Third Judicial Department, and upon this remittitur an order of the latter court, adopting as its own the order and judgment of the Court of Appeals, was entered on June 25, 1942.

Jurisdiction.

Jurisdiction is conferred upon this Court to review the order, judgment and decision of the Appellate Division, entered on the remittitur of the Court of Appeals, by Section 344b of U. S. C. A., Title 28. This statute reads (in part) as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

Examining the instant case in the light of the above-quoted jurisdictional requirements, it appears that said requirements are fully answered and that this application is proper. The judgment and order of the Supreme Court, Appellate Division, Third Judicial Department, is a final judgment and order rendered by the highest Court of the State of New York in which a decision in a Workmen's Compensation Law case could be had.

Salomon v. *State Tax Commission of New York*, 278 U. S. 484;

Meyers v. *International Trust Co.*, 273 U. S. 380.

At the trial of this claim and upon the appeals there was drawn in question the validity and applicability of a statute of the United States, to wit: Section 51 of the Federal Employers' Liability Act (U. S. C. A., Title 45).

Furthermore, a right, privilege and immunity was specially set up by the respondent employer railroad under a statute of the United States. The said right, privilege and immunity so claimed consisted in the contention that the respondent was not liable for compensation to the claimant for the reason that his claim was governed by the Federal Employers' Liability Act and that claimant was therefore not entitled to compensation under the statutes of the State of New York. In the Court of Appeals and in the Appellate Division your petitioner contended that said Federal statute was not applicable and that the Workmen's Compensation Law applied.

The record and briefs conclusively establish that this Federal question was presented for decision in the State courts and that the decision of the Federal question was necessary to the determination of the cause. This necessity is self-evident, for the Federal question constituted the sole issue in both appeals. The following authorities establish the authority of this Court to review Federal questions similar to that herein.

Murray v. *Joe Gerrick & Company*, 291 U. S. 315;
California v. *Deseret Water, Oil & Irrigation Co.*, 243 U. S. 415;
Atchison, T. & S. F. R. Co. v. *Robinson*, 233 U. S. 173;
Seaboard A. L. R. Co. v. *Horton*, 233 U. S. 492;
Toledo, St. L. & W. R. Co. v. *Slavin*, 236 U. S. 454.

Statement of the Case.

The Court is respectfully referred to the factual statement contained in the *Third* paragraph of the petition, and to the analysis of the dispositions of the case below, which

analysis is contained in the 4th, 5th and 6th paragraphs of the petition.

Specification of Errors.

The Court of Appeals erred:

1. In affirming the Appellate Division holding that the 1939 amendment to the Federal Employers' Liability Act made said act practically all inclusive of employees of interstate carriers and particularly of the claimant herein, thus foreclosing the Industrial Board of jurisdiction herein.

2. In overruling the Industrial Board's contention that the amended statute, as interpreted by the Appellate Division, violates the Constitution of the United States.

Summary of Argument.

The claim would not have come under the Federal Employers' Liability Act if it had arisen prior to the 1939 amendment to Section 51 of said Act. This amendment was passed to affect the rights of employees of interstate carriers whose duties require them to shift constantly in the course of their duties from interstate commerce to intrastate commerce and vice versa; i.e., employees engaged directly in train movements. The claimant was not such an employee and, therefore, is not subject to legislation designed to affect such employees.

The legislation in question was not passed for the purpose of drawing a new line of distinction or separation between interstate and intrastate commerce by railroad, its sole purpose being to bring a certain class of employees, those who entered both kinds of commerce in the course of their usual duties, within the Federal Act.

The statute, if intended to affect employees who do not enter into interstate commerce in the course of their usual duties, encroaches on the reserved powers of the states and is in violation of the Federal Constitution.

POINT I.

The claimant does not come within the provisions of the Federal Employers' Liability Act, as amended on August 11, 1939, and the State Industrial Board has jurisdiction of his claim pursuant to the provisions of the New York State Workmen's Compensation Law.

Prior to the amendment of August 11, 1939, Section 51 of the Federal Employers' Liability Act read (in part) as follows:

> "*Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.* Every common carrier by railroad while engaging in commerce between any of the several States * * *, shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce.* * * *." (Italics ours.)

The meaning of the italicized words was the subject of extensive litigation, but finally there was established a standard for determining whether an employee was "*in such commerce*" or out of same. The standard, as expressed in *Shanks* v. *D. L. & W. R. R. Co.*, 163 A. D. 565, aff'd 214 N. Y. 413, aff'd 239 U. S. 556, was as follows:

> "Was the employee *at the time of the injury* engaged in interstate transportation or in work so closely related to it as to be a part of it?" (Italics ours.)

Accordingly, for many years, the issue of whether a railroad employee's claim came under the Federal Act or under a state compensation law was determined by examining the nature of his work *at the particular time when the accident occurred.*

In 1939, however, Congress amended Section 51 of the Federal Employers' Liability Act in such a manner that

the rule of the *Shanks* case was changed. The case at bar, in which the accident occurred on November 22, 1939, must be viewed in the light of this amended statute, which reads (in part) as follows:

> "Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.* * * *.
>
> Any employee of a carrier, *any part of whose duties* as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404." (Italics ours.)

The scope of this amended statute is the sole issue herein. The petitioner contends that the amendment does not apply to "practically all employees of interstate carriers", that the act is not "now all inclusive and made so purposely", and that the amendment has no effect upon the case at bar.

Before dealing with the scope of the amended statute the petitioner will briefly demonstrate that the claimant's duties as a boilermaker, at the time of his injury *and at all times*, were purely and definitely intrastate. As noted in the petitioner's statement of facts, boiler and tank repairs could not be made unless the engine was withdrawn from service, its fires dumped and its water emptied. The "hot gang" performed these functions and then the boilermakers entered the picture to make the repairs. It is well settled that such repair work is not interstate transportation or work so closely related thereto as to be a part thereof. See the following cases:

Ind. Acc. Comm. v. *Davis*, 259 U. S. 182.
Morini v. *Erie R. R. Co.*, 253 N. Y. 539.
Leslie v. *Long Island R. R. Co.*, 248 N. Y. 511.
Zmuda v. *D. L. & W. R. R. Co.*, 268 N. Y. 659.
Conklin v. *N. Y. Central*, 206 A. D. 524, writ denied, 266 U. S. 607.

The manifest object of Congress in amending the statute was solely to eliminate the first requirement of the *Shanks* rule, that the work being done *at the time of the injury* shall determine jurisdiction. The object of Congress was to include within the Federal Act all those employees who, although injured while performing an intrastate task, usually performed interstate work in the course of their daily duties. Accordingly, Congress used the words "*any part of whose duties*", italicized by the petitioner in setting forth the amended statute above. The *Shanks* rule, restated to conform with this statutory change, would read as follows:

> "Was the employee, *irrespective of what he was doing* at the time of the injury, *one who ordinarily* engaged in interstate transportation or in work so closely related to it as to be a part of it?" (Italicized words added.)

The respondent railroad successfully contended below that the claimant herein, a boilermaker who was injured in the intrastate work of a boilermaker, which took up five full days of his working week, is one whose duties were partly in interstate commerce because he assumed another position, involving interstate activity as an inspector, on the sixth day. The respondent's position is that a literal interpretation of the words "any part of whose duties" requires the conclusion that the Federal Act applies.

The petitioner Industrial Board contends that the letter of the law is subordinate to the spirit and intention thereof,

that the words relied upon by the respondent really mean, in this case, "any part of whose duties as a boilermaker." The petitioner respectfully submits that the claimant's duties in his usual intrastate employment as a boilermaker are the determining factor, notwithstanding the claimant's substitution, on one day each week, for the boiler inspector. The petitioner will show that it was not the intent of Congress to include employees of the claimant's class within the Federal Act.

For this purpose a study is invited of certain pertinent parts of the report of the Senate Judiciary Committee, dated June 22, 1939, which furnishes excellent confirmation of the position taken by the petitioner. The specific and primary issue herein is *whether the claimant's work on one day each week as a boiler inspector of interstate engines brings him within the amended statute,* and the petitioner's argument for the negative of this proposition is based upon explicit expressions in—

The Report of the Senate Judiciary Committee.

All of this report is not here pertinent. Amendments to sections other than and foreign to Section 51 are also discussed. The opening paragraph of the pertinent part, that dealing with the amendment to Section 51, states

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers, who, *while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.*" (Italics ours.)

There is no ambiguity or uncertainty in this expression of purpose. The intent was to affect those employees who *ordinarily* engage in interstate transportation and are injured while *temporarily divorced therefrom.* The claimant

in the case at bar is clearly and definitely outside the class affected. On five of his six working days he was engaged solely in *intrastate* activity, so he could not be considered as one "ordinarily engaged in the transportation of interstate commerce."

Neither was he, at the time of the injury, "*temporarily divorced therefrom*". In the main his work was not connected with interstate transportation. He was divorced from interstate transportation, not only at the time of the injury, but on five full days in each week. "*Temporarily*" is most certainly the wrong adverb for describing this claimant's separation from interstate transportation.

In the following and concluding paragraphs the Committee plainly and unambiguously indicates the class of employees at which the amendment was directed, and that employees of the claimant's class are not within the scope of the amendment. These paragraphs follow:

> "Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be *engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.*
>
> The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, *at the very instant of his injury or death*, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.
>
> The preponderance of service performed by railroad *transportation* employees is in interstate commerce. *As to those who are constantly shifting from one class*

> *of service to another,* the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." (Italics ours.)

The claimant herein did not go from one kind of commerce to another "several times during a single tour of duty." He worked solely on intrastate work for five full days out of six. There was no need to determine what kind of movement he was engaged in "at the very instant of his injury." He was not "constantly shifting from one class of service to another." He was not a transportation employee.

The petitioner respectfully submits that the Committee report, partly set forth in the above analysis, conclusively establishes that the intent of Congress was to affect only those employees whose usual, daily and principal duties involve a constant shifting between the two kinds of commerce. Accordingly, one whose duties were never in interstate commerce would certainly remain under the State compensation law. The claimant's position and duties *as a boilermaker* fall within this category.

Certainly, it is clearly apparent that the purpose of the Federal legislation was to amend a statute, itself remedial in character, so as to do away with a narrow test which experience had proven impracticable, and to broaden its scope so as to give employees mainly engaged in work unquestionably interstate in character the benefits thereof. Yet the respondent asks for an interpretation not only foreign to the purpose of the legislation, but so harsh as to destroy the rights under State laws of those not originally covered by the Federal amendment.

The respondent's position is based upon the claimant's change to interstate duties on one day each week. Because of this, the railroad argues, he became subject to the Federal Act at all times. The logical corollary of this proposi-

tion is that if he engaged in interstate transportation on one day in the year, on one day in six months, or on one day in the month, he thereby became subject to the Federal Act. As the Committee report shows, such a result was not intended by Congress. It is submitted that the aforesaid *reductio ad absurdum* completely answers the employer's argument.

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The next contention of the petitioner is addressed to the language italicized in the following quotation of the amended statute:

> "Section 51. * * *. Any employee of a carrier, any part of whose duties as such employee shall be *the furtherance of interstate or foreign commerce; or shall, in any way directly, closely and substantially affect such commerce* * * *."

It is the contention of the petitioner that by the italicized words *Congress did not mean to draw a new line of distinction or separation between local and interstate activity.* The sole purpose was to bring a certain class of employees, those who entered both kinds of commerce in their usual duties, within the Federal Act. *The minutes show a studied intent to avoid changing the dividing line between the two types of commerce.* They indicate that the use of the italicized words was meant to be merely an expression of the old standard used in drawing said line.

The Minutes of the Senate Judiciary Committee Hearings.

A Sub-committee of the Committee on the Judiciary of the United States Senate (76th Congress, 1st session) took testimony in connection with Senate Bill 1708, amending the Federal Employers' Liability Act. The hearings held on March 28th and 29th, 1939, are the hearings at which the

particular amendment involved in the instant case was discussed. Other amendments, not pertinent herein, were also discussed at these two hearings, so the Court is respectfully referred to the following pertinent pages of the printed minutes.

Pages 3- 9	Pages 64-66
Pages 26-29	Pages 73-76

The minutes above cited, which, for the purpose of brevity, will not be analyzed herein, conclusively establish the following principle. Controlled by the statutory direction that an employee's general work shall be the criterion for determining what is interstate commerce and what is not, it is still the function of the courts to draw the line between interstate and intrastate activity.

The line established in the *Shanks* case remains undisturbed—"in interstate transportation or in work so closely related to it as to be a part of it." The new language is nothing more than a re-phrasing of that part of the *Shanks* rule. The minutes, cited above, firmly establish that Congress did not seek a new standard of coverage.

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On the constitutional issue, it is significant that the original Federal Employers' Liability Act, passed in 1906, was held to be unconstitutional because it contained the very provisions read into the 1939 amendment by the view of the courts below and by certain railroad and insurance carriers in this State.

Howard v. *Illinois Central R. Co.*, 207 U. S. 463.

In the *Howard* case it was held that when an act of Congress, in assuming to regulate interstate commerce, covers intrastate as well as interstate commerce, the act must fail completely. The 1906 Act embraced employees of all kinds, whether or not they were engaged in interstate com-

merce. The Act required mere employment by an interstate carrier. It was held to be void and unconstitutional because in embracing all employees it necessarily embraced those engaged in intrastate commerce. The same fatal error is apparent in the opinion of the courts below. It was said below that the amendment "includes practically all employees of interstate carriers" and that "The act is now all inclusive". On the authority of the *Howard* case, such a position cannot be sustained.

Conclusion.

The claimant in the case at bar never took part in interstate activity as a boilermaker. In this capacity he never switched from local work to work in interstate transportation. Thus he is unaffected by the 1939 statutory change. Under the law and decisions prior to the change his case comes unquestionably under state jurisdiction. So it does at present because the amendment was directed at an entirely different class of workers.

The correct interpretation of the legislation involved herein is of prime importance to thousands of railroad workers in this State. In the majority opinion below the position is taken that the Federal statute now includes "practically all employees of interstate carriers". Thus, if that position should be upheld, the burden of proving negligence in connection with personal injury claims would be cast upon these employees, many of whom are now protected by the New York State Compensation law, under which there is no such requirement.

The circumstances of this case involve a Federal question of substance and importance, and the decision of the Court of Appeals of the State of New York affirming the Appellate Division and reversing the Industrial Board is not in accord with the expressed intent of Congress in amending

the Federal statute. Therefore, the application for a Writ of Certiorari should be granted.

Respectfully submitted,

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